

Young & Rubicam International, Inc., and ASMP—The Society of Photographers in Communications,¹ Petitioner. Case 2-RC-17304

December 2, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PENELLO
AND WALTHER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Howard Shapiro on May 25, 26, 27, and 28; June 1, 2, 3, 7, 8, 9, 11, and 14, 1976. Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 2 transferred this case to the National Labor Relations Board for decision. Thereafter, the Employer and the Petitioner filed briefs with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record in this case, including the briefs of both parties, the Board finds:

1. The Employer, a New York corporation with its principal place of business located at 285 Madison Avenue, New York, New York, is a general advertising agency. During the past year, the Employer received gross revenues in excess of \$1 million, of which more than \$50,000 was derived from clients outside the State of New York. Therefore, because the Employer meets any of the discretionary jurisdictional standards which the Board applies, we find it will effectuate the policies of the Act to assert jurisdiction herein.

2. Petitioner contends that it is a labor organization which seeks to represent certain employees of the Employer. The Employer takes the position that the individuals which Petitioner seeks to represent are not employees within the meaning of the Act, and therefore that Petitioner is not a labor organization. However, the Employer stipulated at the hearing that Petitioner is a labor organization on the condition that the individuals it seeks to represent are found to be employees within the definition of the

Act. If the conditional stipulation offered by the Employer is not appropriate, the record is insufficient to show that Petitioner is a labor organization as described in Section 2(5) of the Act. Thus, whether Petitioner can be regarded as a labor organization for purposes of this proceeding depends on whether we decide that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act. In view of our conclusion below that the individuals in question are not employees within the meaning of the statute, we find that the record does not show Petitioner to be a labor organization as defined in the Act.

3. No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

Petitioner seeks a unit composed of all freelance professional photographers employed by the Employer in New York County to render photographic services for advertisements intended for the print media, and who engaged in or performed such services for the Employer on not fewer than 3 shooting days, and for advertising agencies (including the Employer) on not fewer than 12 shooting days, during the 12-month period from October 1, 1974, to September 30, 1975. The Employer, on the other hand, contends that the freelance photographers which Petitioner seeks to represent are independent contractors, and not employees within the meaning of the Act. Further, the Employer argues that even if the individuals in question are found to be statutory employees, the unit sought by the Petitioner is inappropriate, and that the voting eligibility formula used by the Petitioner is also incorrect. Because we agree with the Employer that the freelance photographers who would be included in the petitioned-for unit are independent contractors rather than employees, we do not reach the unit and eligibility issues raised by the Employer.

Before reviewing the particular facts of the case and the specific applicable case law, a summary of the general principles which guide us in determining independent contractor status may be useful.

Basic Principles

Section 2(3) of the Act excludes "any individual having the status of an independent contractor" from the definition of employee. Drawing upon the legislative history to the amendment in 1947 of Section 2(3) in regard to independent contractors, the Supreme Court has concluded that independent contractor status is to be determined by assessing "the total fac-

¹ The name of the Petitioner appears as amended at the hearing

tual context . . . in light of the pertinent common-law agency principles.” *N.L.R.B. v. United Insurance Company of America*, 390 U.S. 254, 258 (1968). Foremost among such principles is the “right to control” test, which the Board described in *News Syndicate Co., Inc.*, 164 NLRB 422, 423–424 (1967):

Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

Among other relevant agency factors are the skills required in the occupation; whether the one employed is engaged in a distinct occupation or business; whether the employer or the one employed supplies the instrumentalities, tools, and place of work for the job; the length of time for which the individual is employed; the method of payment (by time or by job); whether the work to be performed is part of the regular business of the employer; whether or not the parties believe they are creating an employer-employee relationship; and whether the employer is or is not in business. See Restatement (Second), *Agency* § 220, pp. 485–486 (1958).

Bearing in mind these general criteria, a careful outline of the operative facts adduced at the hearing, viewed in light of cases involving analogous circumstances, discloses that the individuals sought to be represented by the Petitioner have the status of independent contractors.

Facts

The Employer, as noted, is a general advertising agency. Work begins on an advertisement for a client with the development of a general creative strategy or concept. This concept is then translated into a rough draft of a proposed advertisement by an art director, who is responsible for the graphics and visual appearance of the ad, and by a copywriter, who contributes the editorial content of the ad. If the rough draft is found satisfactory, it is further refined into a more finished version of the ad called a layout. If the layout is approved by the client, the next step is usually final production of the advertisement.²

Because most print media advertisements involve the use of photographs, the Employer must select a photographer to transform the visual aspect of the

layout into a suitable picture for the ad. The Employer’s policy is to use only freelance photographers to do the final photography for an advertisement.³ The art director working on the particular ad to be produced and an art buyer generally select the photographer for the assignment. A photographer may be chosen for a job in one of three ways: by competitive bidding, in which the lowest bid, from among those submitted by three photographers whom the Employer asked to bid is selected; by comparative bidding, in which the skills of each of the three photographers requested to bid as well as the prices asked are taken into account in making the final choice; or by single choice, in which a photographer is chosen based on his creative abilities, because the client prefers a certain photographer, or for some other reason, without bidding.⁴ Most photographers are chosen on a comparative bid basis.

Before the photographer undertakes the actual shooting for the advertisement, either he or his business representative discuss the details of the assignment with the art director by telephone and/or in person at a “preproduction” meeting. An art buyer and other individuals working on the account may also attend the preproduction meeting. Such matters as selection of models, the location of the shot if it is to be on location, the use of props, the lighting and background of the shot, etc., are considered during the preproduction conference. The photographer, however, is responsible for the casting of models, where needed, subject to approval of the art director, and for searching out locations if the shot is not to be taken in his studio.

In the overwhelming majority of cases, the actual shooting for the advertisement takes place in the photographer’s studio, rather than “on location.” Besides the photographer, his assistant, and the art director, others present at the shooting may include models, home economists (for food shots), stylists (a special type of photographic assistant), executives assigned to the account for which the ad is being produced, and representatives of the client.

Seven photographers testified at the hearing about various aspects of their activities, and much of their testimony centered around their working relationship

³ There appear to be two reasons for this policy. One is to avoid a possible conflict of interest in the eyes of the client by assigning work to a staff photographer, who may be of limited ability. The other is to enable the Employer to draw upon a large pool of talented photographers in selecting the best photographer for a certain job.

⁴ The Employer provides each photographer it requests to bid on a job with an art estimate form, which contains the vital information about the assignment and which the photographer uses to estimate his fee plus the amount of certain reimbursable expenses he expects to incur. The photographer is also furnished with a copy of the layout of the ad for which the photograph is desired. When a photographer has been selected to do a job, a purchase order form is executed, which is an authorization for the job to be performed at the approved cost, including known reimbursable expenses.

² Occasionally, the client may request a more sophisticated layout, referred to as a comprehensive, before the ad is produced.

with the art director during a shooting. Generally, the photographers agreed that it is common for them to take Polaroid pictures of the objects and/or models arranged for the photograph for the art director to inspect, and to allow the art director, and sometimes representatives of the client or others, to look through the lens of the camera at the arrangement. The purpose of both practices is to enable the art director to instruct the photographers to make whatever changes are considered necessary so that the finished photograph will conform to the concept expressed in the layout.

The record shows that art directors give instructions at the shooting on such matters as position of props and models, wardrobes, appearance of food in food shots, intensity and type of lighting, angle from which the photograph should be taken, changes in background color, and use of a wide angle lens. It appears, however, that although the art director sees to it that the photograph is made along the lines suggested by the layout, the photographer selects the photographic means by which the art director's instructions in this regard are carried out. In this connection, various photographers testified that such matters as the types of cameras, filters, lights, lenses, etc., which should be used are within their professional discretion. One of the photographers called to appear at the hearing by Petitioner summed up her understanding of her relationship with the art director in executing an assignment in this way,

I am hired to do the job that is required of me by that art director. . . . an art director gives me a layout and I consider my responsibility to execute the photograph that to the best of my abilities satisfies the requirements of that art director's layout.

When the shooting has been completed, the photographer develops black and white pictures in his own darkroom, and sends any color pictures to an outside laboratory to be developed. Afterwards, the photographer sends a large selection of prints or chromes to the art director, who decides which photographs should be used in the actual advertisement.

Besides information concerning the selection of freelance photographers for assignments by the Employer and about how photographic jobs are carried out, the record contains considerable evidence regarding other factors relevant to a determination of whether the individuals in question are employees or independent contractors.

1. The record indicates that freelance professional photographers are highly skilled and talented individuals. They acquire their skills by earning a college degree in photography, by taking courses at photo-

graphic schools, or by lengthy apprenticeships as assistant photographers. Each photographer has at least one specialty, such as fashion, fashion illustration, illustration, or still life. Photographers are chosen to bid on assignments based on their particular skills and specialties, and the work itself is creative in nature.

2. At least 19, and perhaps as many as 25, of the 35 photographers who would make up the bargaining unit desired by the Petitioner conduct their activities as New York corporations. In pertinent part, it was stipulated that all the certificates of incorporation substantially provide that the purpose of the corporation is to—

engage in and conduct a business and to operate a photographic studio, to engage representatives and assistants, to take photographs and to process same or have same processed and to perform such additional services permitted by law that are necessary or proper to carry out the purposes of the corporation after [sic] its business activities.

Two of the unincorporated photographers who testified at the hearing stated that they pay New York State and New York City unincorporated business taxes. Also, none of the photographers who appeared at the hearing listed fees paid by the Employer as wages on their Federal and state income tax returns, because the corporate photographers filed corporate tax returns and the others paid unincorporated business taxes.

3. It was also disclosed at the hearing that the Employer pays sales taxes on the fees it pays to the freelance photographers whose services it utilizes. The Employer does not withhold Federal, state, or city income taxes from the fees it pays to the photographers, nor does it take any of the other usual employer deductions such as for social security. The Employer also provides no fringe benefits to the photographers, such as vacation and holiday pay, life insurance, retirement and profit-sharing benefits, and hospital and surgical insurance, even though its regular employees receive all these benefits.

4. Each freelance professional photographer rents a studio in which, as noted, he executes most of the photographic assignments he receives. These studios include a darkroom, and some are equipped with a kitchen (for food shots), offices and conference rooms, and dressing rooms for models. Each photographer, of course, pays for utility services for the studio, as well as necessary insurance coverage, such as for fire, theft, and property damage.

In addition, freelance photographers have a considerable capital investment in much highly expen-

sive and sophisticated photographic equipment, which they use to complete their assignments. Among the photographers who gave testimony at the hearing, the cost of the equipment ranged from \$15,000 to \$80,000, and the present value of the equipment was estimated at between \$15,000 and \$95,000 and \$100,000. Some photographers also have a major investment in studio fixtures and furnishings in addition to the photographic equipment.

5. All but one of the photographers at the hearing employed at least one full-time employee. Each photographer, except one who uses a freelance assistant, had at least one full-time photographer's assistant.⁵ Some photographers also employ a full-time secretary, stylist, and/or bookkeeper. Of the seven photographers who gave testimony, one had five full-time employees, one had four; one had three; one had two; two had one; and one had none. One photographer also employs two part-time assistants. The photographers make the common employer deductions from the paychecks of their employees for such items as Federal, state, and city income taxes, social security, etc. They also furnish such benefits to their employees as paid vacations and holidays, and some even provide a pension and profit-sharing arrangement and major medical coverage. Naturally, the employees receive the protection of workmen's compensation and unemployment insurance coverage.

In addition, each photographer employs a business representative or agent who is compensated on a commission basis. The agent's job is to seek assignments for the photographer, to prepare cost estimates on jobs, to negotiate fees, to attend preproduction meetings on behalf of the photographer, and to prepare and submit bills for completed work.

6. Aside from finding work through the assistance of an agent, freelance photographers commonly advertise in a trade book which is a directory of photographers. Photographers also seek work by means of direct mail advertising to potential employers, and by displaying portfolios containing samples of their work to possible employers.

7. Except in rare cases in which a "day rate" is paid for certain types of work, the Employer compensates the photographer for his services with a flat fee. The most important consideration in deciding the amount of the fee is the intended use of a photograph. The highest fee is payable for a photograph which is to be used in an advertisement in a national magazine of unlimited circulation. The next highest fee, two-thirds to three-fourths of the full price, is

paid for use of a photograph in an ad in a magazine of limited national circulation. A still lower fee, ranging between one-half and three-fourths of the full fee, is paid for a photograph which is expected to run in an advertisement in a trade publication. Finally, an agreed-upon "day rate" is paid for experimental photography—photography which may or may not result in a photograph which will be used in an advertisement. An additional fee must be paid for a different or additional use of a photograph, unless the Employer buys the right to unlimited use of a photograph. Such an outright purchase of a photograph is uncommon.

Other factors involved in deciding the amount of the flat fee include the complexity of the job, the skill of the photographer, the type of film required, and the length of time it is estimated it will take to do the job. However, once the fee is fixed the photographer must usually complete the assignment at the same cost even if it takes longer than at first expected. If the Employer wants a "reshoot" of a job for a reason other than the fault of the photographer, the photographer will generally receive about one-half the original fee for the extra work.

The flat fee payable to the photographer by the Employer for a job also covers certain expenses which the photographer may incur in executing the assignment. Certain other expenses, however, are reimbursed by the Employer. In general, the fee includes the straight-time salaries of photographers' assistants working on the job, the time of salaried office staff employees such as a secretary or bookkeeper devoted to work relating to the assignment, the commission of the agent for time spent on the job, black and white film and processing, color film and processing to the extent that the charge does not exceed 10 percent of the flat fee, film for Polaroid cameras, use of the studio (which the photographer rents, furnishes, and supplies with utilities), use of the appropriate photographic equipment (which the photographer owns, maintains, and insures). On the other hand, the Employer will reimburse the photographer for such expenses as overtime pay for staff employees working on the job, color film and processing charge where the charges exceed 10 percent of the total fee (the entire color film and processing charges are reimbursed for experimental photography), costs incurred in searching for and securing locations for location shots, rental of props and wardrobes, costs of set construction, and food, lodging, and travel expenses where incurred.

8. The record also reveals that freelance photographers are at liberty to accept or reject a request by the Employer to bid for or perform an assignment. Nor does the Employer require any photographer to

⁵ The assistant performs such tasks as setting up and moving props and lights, setting up and loading cameras, developing film, etc

execute a certain number of assignments for it over a length of time. In fact, each of the photographers testifying at the hearing performed the vast majority of his or her total number of assignments in 1975 for advertising agencies other than the Employer. The relevant figures appear to be about 6 assignments done for the Employer out of a total of 150 jobs for one photographer, and 3 out of 150, 6 out of 120, 6 out of 28, 3 out of 180, 12 out of 200, and 7 out of 200, for each of the others.⁶

Conclusions

When the relevant case law is applied to the foregoing facts, the conclusion that the freelance photographers which Petitioner seeks to represent are independent contractors becomes evident.

In the first place, we cannot accept Petitioner's chief contention that the general supervision of the art director over a photographer's execution of an assignment satisfies the Board's "right to control" test expounded in *News Syndicate Co., Inc., supra*. As explained at the outset, "right to control" refers to an employer's retention of control over the manner and means by which the individual providing services performs the job, rather than to control over the desired result. We are satisfied that the nature of the instructions which an art director may give to a photographer at a shooting (such as the angle from which the photograph should be taken, how models and props should be positioned, intensity of the lighting, and so forth) are given to insure that the final product conforms as closely as possible to the concept represented in the layout. The technical and creative means by which the photographer carries out the instructions of the art director and satisfies the requirements of the layout are left to the professional judgment of the photographer—which is logical because it is his professional skill in such matters that the photographer is hired to provide.

The Board faced a similar issue in *Associated Musicians of Greater Newark, Local #16, American Federation of Musicians, AFL-CIO*, 206 NLRB 581 (1973), affd. 512 F.2d 991 (C.A.D.C., 1975), a secondary boycott action. In that case, a restaurant and lounge, The Manor, hired an orchestra leader to lead a band which he provided at its place of business. Respondent contended that the musicians playing in the band were employees of The Manor, and not part of an independent contracting arrangement between the orchestra leader and The Manor, because The Manor insisted that "certain kinds of music not be

played in the lounge, that the musicians maintain the appearance required by the management, and that certain behavior considered offensive to the guests of the Manor (smoking or drinking on the bandstand) be avoided, and reserved the right to set and change the hours of performance." 206 NLRB at 589.

In a decision adopted in pertinent part by the Board, the Administrative Law Judge rejected Respondent's assertion that the restaurant and lounge retained significant control over the manner of the musicians' performance, as opposed to the end result, and noted that, "the service contracted for was not merely music, but music that would be pleasing to the customers of the Manor and attractively presented in the circumstances." 206 NLRB at 589. Similarly, in the instant case, what the Employer is contracting for is a photograph which will faithfully express the creative idea embodied in the layout, and the type of instructions given to a photographer by an art director properly relate to this end rather than to the technical means by which that goal is achieved. Perhaps the point is best conveyed by the following analogy drawn by the Administrative Law Judge in *Associated Musicians*: "When one engages a contractor to build a house, the contractor does not become any less independent because the purchaser determines the kind of house, where it is to be placed, the kind of materials to be used, the times of construction, or even the times of day when building shall take place . . ." 206 NLRB at 589.⁷

Another case relevant to the issue of "right to control" is *American Broadcasting Company, a Division of American Broadcasting-Paramount Theatres, Inc., et al.*, 117 NLRB 13 (1957), in which composers who accepted assignments to write music for radio and television programs were found to be independent contractors. After accepting an assignment, the composer would meet with a producer to discuss the type of music needed for the program and the technical details involved. If the producer and the composer happened to disagree about the specifications for the music, the composer would accede to the wishes of the producer and would write the music accordingly. In making its independent contractor finding, the Board stated, "Because of the nature of the art of musical compositions, the specifications which CBS transmits to a composer of necessity relate principally to the effects to be produced by the music and not to the manner in which that effect is to be achieved."

⁷ It is also noteworthy that the orchestra leader in *Associated Musicians* was found to be an independent contractor even though his band played exclusively for The Manor for 8 or 9 years. Thus, the instant situation, in which freelance photographers work only a small portion of their time for the Employer, is far more compelling for finding independent contractor status. Furthermore, like the present case, the musicians in *Associated Musicians* did not receive the job benefits to which regular employees of The Manor were entitled.

⁶ It should be noted in addition that the Employer made approximately 350 photographic assignments to some 150 photographers in 1975.

117 NLRB at 18. Again, the analogy to the present case suggests itself. The producer instructs the composer to follow certain specifications to achieve the desired musical effect, just as the art director instructs the photographer to make certain visual adjustments to insure that the proper concept is expressed in the photograph.

Finally, as to the "right to control" question, in *Boston After Dark, Inc.*, 210 NLRB 38 (1974), which will be considered in greater detail below, freelance contributors to a weekly newspaper were found to be independent contractors, even though their work was subject to "correction or substantive editing" by the employer.

In addition to the "right to control" issue, virtually all other relevant factors point convincingly to the conclusion that the freelance photographers whom the Petitioner seeks to represent operate as independent businessmen rather than serving as employees. Thus, each photographer rents and maintains a studio at his own expense in which he executes most of the assignments which he receives from advertising agencies, and in which he develops the photographs which result. Each photographer has a heavy capital investment in sophisticated photographic equipment needed for him to accept jobs, and all but one of the photographers testifying at the hearing had at least one full-time employee, from whose salary employer deductions are taken and who receives certain fringe benefits as an employee. Also, the majority of the photographers who would be included in the Petitioner's proposed unit are incorporated as businesses, and none of the photographers report the fees received from photographic assignments on individual income tax returns as wages but instead file corporate or unincorporated business tax returns. All freelance photographers employ agents on a commission basis to perform certain business tasks and to solicit jobs. Many photographers also advertise in a trade directory and/or by direct mail to get assignments. Freelance photographers are at liberty to accept or reject assignments from the Employer or requests to bid for assignments. Each of the photographers who appeared at the hearing spent only a relatively small proportion of his time making photographs for the Employer.

Of great significance also is the fact that the Employer pays the photographer a flat fee for his services on an assignment in nearly all cases. The Employer pays sales taxes on the fee, does not take any of the usual employer deductions out of the fee, and does not provide the photographer with any fringe benefits in addition to the fee. The fee paid to the photographer by the Employer is based mainly on the intended use of the photograph, rather than the

time needed to do the job, and the Employer must pay a further fee for an additional or different use of the photograph unless it buys the rights to the photograph outright. Generally, no additional fee is paid if a job takes longer to complete than anticipated. Further, some of the expenses incurred by a photographer in doing a job are not reimbursable from the Employer, and consequently the photographer depends upon having a profit left over when his non-reimbursable expenses are subtracted from the flat fee.

It should also be remembered that freelance photographers are highly skilled and creative individuals, who are selected for jobs in large part for their talent and expertise in a specialized field of photography.

In this connection *Boston After Dark, supra*, is relevant. There, the employer, a weekly newspaper, paid freelance contributors a flat fee for each article, photograph, or cartoon accepted for publication. The employer took no payroll deductions out of the fees paid to the freelancers, and granted them no fringe benefits which regular staffers received. The freelancers were permitted to contribute material or not as they wished each week, and they were free to contribute to other publications as well. Some of the freelancers spent as much as half their time at the newspaper office, and some depended almost entirely on the fees they received from the newspaper for their livelihood. On these facts, the Board found the freelancers to be independent contractors, relying principally on their ability to contribute to the newspaper at their pleasure to distinguish them from staff employees.

The facts in *Boston After Dark* are comparable to those in the instant case. Here the record is unambiguous that photographers are free to accept or reject requests by the Employer to bid for an assignment or to perform an assignment. As in *Boston After Dark*, the photographers are compensated on a flat fee for each job, and the employer takes no deductions from the fee, nor does it give fringe benefits to photographers in addition to the fee. Unlike *Boston After Dark*, and strongly supporting the conclusion that they are independent contractors, the photographers do not do their work at the Employer's premises, and none of those who testified at the hearing depend heavily for work from the Employer to make a living.

Also pertinent is *Century Broadcasting Corporation d/b/a WFMF*, 198 NLRB 923 (1972), in which the Board decided that certain freelance radio announcers were independent contractors. In that case, the general manager of a radio station conducted auditions for announcers, seeking individuals "who have substantial broadcasting experience and are skilled

in projecting a slow, deliberate, adult sounding voice in keeping with the image the station seeks to maintain." 198 NLRB at 923. If approved, an announcer would be placed on a list at the station. Thereafter, announcers would be contacted in rotating order from the list to determine if they would be available for a taping session at a specified time. There was no supervision at the taping session, as the "inflections, pauses, idiom, and mood projected on a particular announcement" were left to the announcer's discretion. The announcers were free to accept or reject each assignment, or to obtain a substitute, and there were no restrictions on their work for other stations. The announcers received a flat fee for their services from which deductions were not taken. The radio station did not provide the announcers with fringe benefits available to regular employees.

Century Broadcasting and the instant case are clearly similar in that the individuals in question are selected for work based on talent and experience; they are free to accept or reject assignments; they receive flat fees, out of which employer deductions are not taken, for their work; they do not qualify for fringe benefits which staff employees receive; and the employer does not control the manner and means by which the services are performed (though the radio station uses an audition to make sure its requirements for jobs are met, while the Employer uses general supervision by the art director over the end product at the shooting for the same purpose).

Finally, in *La Prensa, Inc.*, 131 NLRB 527 (1961), a freelance newspaper photographer was found to be an independent contractor. In *La Prensa*, a newspaper agreed to pay a photographer, who had formerly been a staff employee, a flat fee for each photograph

accepted for publication. The photographer used his own supplies and equipment, but used the newspaper's developing room. In making the finding of independent contractor status, the Board stressed that the photographer depended upon the difference between the fee he received for each photograph and the cost of his materials to realize a profit. Thus, in the Board's opinion, the photographer most closely resembled a "small entrepreneur" rather than an employee of the newspaper. It should be added that the photographer in question also had the right to sell his work to other publications.

The entrepreneurial character of the photographer's operations in *La Prensa* is quite like that of the freelance photographers' methods of doing business in this case. As explained earlier, the flat fee which the photographer receives from the Employer covers a number of expenses for which the freelancer is not reimbursed, and thus his profit is based upon the difference between the fee and the nonreimbursable expenses he incurs. As the Employer correctly points out, this case is stronger than *La Prensa* for finding independent contractor status, as these freelancers have a much heavier investment in equipment and studio rental and maintenance, and because they also must pay the salaries of assistants.

In short, we find the freelance photographers whom the Petitioner seeks to represent to be independent contractors and we shall dismiss the petition herein.

ORDER

It is hereby ordered that the petition herein be, and it hereby is, dismissed.